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DISCUSSION RESPONSE

## The limits of emergency mechanisms

JASPER FINKE — 1 September, 2014



### A Response to Tine Hanrieder and Christian Kreuder-Sonnen

Emergency mechanisms are essential in addressing and containing crisis situations such as the recent Ebola outbreak. Tine and Christian have drawn our attention to the development of the WHO's emergency powers, and to how recent changes and adjustments of the organization's response compared to the 2009 swine flu outbreak had a legitimacy enhancing effect. At the same time, however, thinking and conceptualizing crises within the emergency paradigm is also misleading.

Tine's and Christian's contribution already points to this misleading potential when noting that the "Ebola case also demonstrates that underlying questions of distribution cannot be resolved by crisis interventions". In the following post I will focus not so much on the specific emergency powers of the WHO, but sketch out the general shortcomings of this concept. It should be understood as an attempt to broaden our perspective so as to better understand the limited use of emergency powers and the conceptual differences between "crisis" and "emergency".

### **The ambiguity of emergency**

The language that is used to describe situations such as the Ebola outbreak is in itself ambiguous. They are referred to as "crises", "emergencies" or "exceptional situations". While it is tempting to use them synonymously in order to avoid repetition, each of them carries a slightly different connotation. These differences can be traced to a fundamental disagreement about the nature of emergencies and which role law might play in responses to them. As Stephen Holmes has pointed out in a 2009 article, the concept of emergency could refer to a set of pre-established rules and procedures that limit discretion in times of crisis in order to provide guidance in disorienting times. At the same time, it could also point to the idea of unfettered discretion and flexibility. The latter understanding reflects an extra-legal approach, which is closely connected to an exceptional understanding of emergency.

A brief examination of the 2005 International Health Regulations suggests that the WHO adheres to a rule-based concept of emergency, even though there is room for improvement. Article 17 for instance provides a set of criteria

that are relevant for making temporary recommendations in case of an emergency. Yet, the soft language of the provision indicates that the Director-General enjoys considerable freedom and flexibility whether or not to take these criteria into account. The rule-based approach is further strengthened by the procedural standards that Articles 12 and 49 provide in connection with the more recent additions of how they are applied. Still, it is important to strengthen and improve this strategy and not just to empower the WHO to act in crises as it sees fit.

### **Emergency measure and their limited impact**

One of the most characteristic features of emergency measures is their temporary nature: the goal is to provide short-term relief. In that sense, they fulfill the same function as painkillers: they hopefully reduce the pain, but do not provide any solution for what has caused the pain in the first place. Similarly, emergency measures do not address the underlying problems of a crisis, but only deal with certain symptoms in order to prevent the situation from deteriorating even further. As Tine and Christian have pointed out, this is also true with regard to the current Ebola emergency. Keeping the Ebola virus from spreading and causing even more victims does not change the existing inequalities in global health.

It is, however, important to note that emergency measures are by definition not meant to address the underlying cause. One should resist the temptation to turn emergency mechanisms into a tool of addressing either these problems or long-term effects of crises. Emergency measures or the emergency powers on which they are based reflect changes in the otherwise existing legal regime: certain actors gain

additional competences, rights of other actors are being limited. This shift is justified in light of the temporary nature of the emergency. Applying emergency measures beyond a specific time-line would permanently change the legal framework and implement the emergency regime for good.

### **Conceptual differences between crisis and emergency**

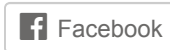
Turning short-term emergency mechanisms into a form of long-term governance is usually justified when a crisis cannot be resolved. This line of reasoning highlights the necessity to stress and uphold the conceptual differences between crises and emergency measures. The short-term aim of emergency mechanisms corresponds to the urgency that is associated with a crisis. However, this connection between emergency and crisis tells only half the story. The term 'crisis' also illustrates a turning point, which implies long-term changes.

This long-term dimension is a key-characteristic of every crisis. Thus, equating crisis with emergency powers and mechanisms not only tends to neglect these long-term effects. It also implies that crises can efficiently be dealt with by applying the emergency paradigm. While it is true that emergency mechanisms are essential in addressing the emergency dimension of every crisis, focusing exclusively on this aspect threatens to overlook the long-term challenges. Thus, responding to crises should always follow a two-tier approach: emergency measures in order to address short-term problems, which are accompanied by rules that safeguard the temporary nature of these measures, and a long-term strategy that addresses the underlying problem. With regard to the current Ebola outbreak, it is this second aspect that needs considerably more attention in order not

to just contain the present crisis, but to reduce the risk of a future and potentially more severe epidemic.

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